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No. 85-1858

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM L. LUKHARD, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

ONA MAE REED, SALLIE LONG, RUTH WILCHER, OPAL MAE COOK, STELLA KING, AND ALL OTHERS SIMILARLY SITUATED,
Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF OF RESPONDENTS

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QUESTION PRESENTED

Whether Virginia's Aid To Families With Dependent Children Program (AFDC) violates the Social Security Act and the federal equitable treatment regulation by treating personal injury awards as "income" instead of "resources".

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STATEMENT OF THE CASE

Title IV-A of the Social Security Act, 42 U.S.C. §§ 601 *et seq.*, establishes the Aid to Families with Dependent Children Program (AFDC). Under this program, the federal government provides matching funds to the states for the purpose of providing a monthly income to needy children while the children are deprived of parental support. In determining a family's eligibility for AFDC benefits during the period of deprivation, a state must consider the family's income and resources. 42 U.S.C. § 602(a)(7).

In recognition of the difference between "income" and "resources," the federal statute and regulations have provided for some protections to be applied to "resources" that are inapplicable to "income". Under the Act, all actually available "income" must be counted against the monthly AFDC grant unless excluded by a statutory exception. 42 U.S.C. § 602(a)(7)(A). However, an assistance unit may own certain exempt "resources" such as a home and a car (up to $1500 in value) and retain up to $1000 equity value in non-exempt "resources," including cash, without becoming ineligible for benefits. 42 U.S.C. § 602(a)(7)(B).

Until 1981, there were no exceptions (statutory, regulatory, or otherwise) to the general rule that only "actually available" income and resources could be counted for AFDC purposes. Thus, prior to 1981, if any AFDC recipient received a nonrecurring lump sum of money, the family could reestablish AFDC eligibility upon a showing that the lump sum was no longer actually available or that resources were below resource limitations.

In the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, 95 Stat. 358 (1981), Congress adopted the "lump sum income rule" found in 42 U.S.C. § 602(a)(17) (Pet. App. 63). Under this amendment, recip-

ients of AFDC who receive "an amount of income which together with all other income. . . exceeds the state's standard of need" are ineligible for AFDC for the period of months determined by dividing the lump sum (and other countable income) by the state's standard of need. By its clear terms, the statute applies only to receipts of "income" and not to resources. Likewise, the implementing federal regulations adopted by the U.S. Department of Health and Human Services (HHS) applied only to receipts of "income." 45 C.F.R. § 233.20(a)(3)(ii)(D) (Pet. App. 68) [1984 version at 45 C.F.R. § 233.20(a)(3)(ii)(F) (Pet. App. 69)].

Both the federal government (until its brief was filed in this Court on June 7, 1986) and the Commonwealth of Virginia (throughout this litigation) explicitly acknowledge that not all lump sums of money fall under the lump sum income rule. Specifically, the rule has no application when money represents a *resource*. Thus, in Virginia's AFDC program, money received upon sale or loss of a car or home or from insurance owned by the family is treated as a *resource*, and the lump sum income rule does not apply. ADC Manual §§ 303.3, 305.4C (J.A. 25-27; Pet. App. 78)[1]

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[1] In 1982 Virginia's regulation provided that money received from exempted resources are resources, not lump sum income, and contained the following example:

> Example 2: Ms. H loses her exempted home as a result of a fire. She receives an insurance settlement in the amount of $20,000. This money is a resource and will be considered in relation to the allowable reserve.

(ADC Manual §§ 305.4C, 303.3) (J.A. 25-26). In January, 1983, the provision was expanded so that proceeds from the sale or conversion of *any* real or personal property are considered *resources:* "[T]he proceeds derived from the sale or conversion of real or personal property are not considered a lump sum. For example, when an insurance policy owned by the assistance unit is cashed in or pays off, the money received will not be considered a lump sum." (J.A. 27)

Even though it treats money received from the sale or loss of property as a "resource," the Virginia Department of Social Services treats money received for personal injuries as "income" and prospectively disqualifies from the program all families who receive personal injury compensation.

Each of the named plaintiffs in this case received money for a personal injury suffered by a family member. They were disqualified from the AFDC program for periods ranging from two to twenty months. Although the briefs of Virginia and HHS omit any mention of the plaintiffs and their fact situations, a review of these facts illustrates the operation and impact of § 602(a)(17) in Virginia.

Ona Mae Reed and her two minor children, age 15 and 10, received AFDC benefits of $233.00 per month in June, 1982. They had no other income. Around June 16, 1982, Mrs. Reed received a worker's compensation lump-sum settlement in the amount of $5,400.00, for injuries she suffered when she fell from a ladder on her job in July 1980. This accident resulted in blood clotting in her legs for which she was hospitalized in 1980 and again in 1982.

The money was used for basic living expenses of shelter, food, and clothing for herself and her children. In addition, Mrs. Reed purchased a used car and used household appliances. Part of the money was spent on the repayment of outstanding loans and bills, including legal fees. By sometime in August, 1982, the proceeds of the settlement were completely exhausted. However, under Virginia's lump sum income policies, Mrs. Reed and her two minor children were found ineligible for AFDC for a period of 20 months (J.A. 13-15).

Sally Long, her disabled husband, and three minor children, ages 16, 14, and 9, were AFDC recipients in April, 1982. They had no other income. Mr. Long was

seriously injured when he was hit by a car. He received a personal injury award of $10,245.95. Most of these funds were used for basic living expenses, including the down-payment on a modest home and a used car. By October, 1982, the money was exhausted, and Mr. Long left the household, leaving Mrs. Long and her three children without any income whatsoever for many months. Mrs. Long reapplied for AFDC in November, 1982, but she was turned down because of the lump sum income rule. Under Virginia's policies, her husband's receipt of $10,245.95 in April, 1982, rendered Mrs. Long and her children totally ineligible for AFDC for eighteen months.

Until the lower court granted her injunctive relief, Mrs. Long and her children lived without utility services, such as electricity, gas, and water. She had been unable to purchase necessary medications or meet her mortgage payments. Her children did not have needed school supplies, clothing or shoes. She depended totally on food stamps and charity to survive (J.A. 15-17).

Ruth Wilcher and her two minor children, age 16 and 9, received AFDC benefits of $255.00 per month in October, 1982. She and her family had no other income. Her sixteen year old daughter was seriously injured in an automobile accident. A personal injury claim, brought on her behalf, was settled for $10,000.00 after payment of attorney's fees. The settlement was approved by the court, and $9,300.00 was deposited by the clerk of court in a trust account, subject to court control, for the benefit of the child. $700.00 was turned over to Mrs. Wilcher to be spent on her daughter's immediate needs.

Mrs. Wilcher bought her daughter some clothing and used the rest of the $700.00 to replace her daughter's bedroom furniture, which had been damaged by two fires.

Under Virginia's policies, the $700 payment rendered her family ineligible for any AFDC benefits for two months and eligible for only partial benefits in the third month (J.A. 18-19).

Opal Mae Cook and her eight year old son received AFDC benefits of $181.00 per month in September, 1983. They had no other income. Her son was injured in a car accident and received $750, after payment of attorney fees, as compensation for his injuries. The money was spent on clothing, coal, and insulation for home heating. Mrs. Cook also spent $200 for a used pickup truck and paid for car insurance.

Because of the lump sum income policies, she was ineligible for any AFDC benefits for three months and eligible for only partial benefits in the fourth month. When she learned of her termination from AFDC, Mrs. Cook sold her truck and cancelled the car insurance for a small refund. However, those funds were soon spent on her living expenses.

Stella King, her disabled husband, and her minor son received AFDC benefits of $233.00 per month. They had no other income. In June, 1983, Mr. King received $2,000 in settlement of a personal injury claim. He took this money and deserted his family two weeks later. Although totally destitute, Mrs. King and her son were disqualified from the AFDC program for seven months under Virginia's lump sum income policies.

In each of the above situations, if the money paid to the family had represented proceeds from the sale or loss of real or personal property, Virginia would not have applied the lump sum income rule to evaluate AFDC eligibility. The family could have requalified for AFDC when the remaining funds fell below resource limits.

Respondents Reed, Long, and Wilcher instituted this action on June 6, 1983, because of the denial, reduction, or termination of their AFDC benefits under the lump sum income rule. They sought injunctive and declaratory relief pursuant to 42 U.S.C. § 1983 and 5 U.S.C. § 701 *et. seq*. They challenged Virginia's policy of counting personal injury compensation as income subject to the lump sum income rule rather than as a resource, asserting the policy to be a violation of the Social Security Act, 42 U.S.C. §§ 602(a)(7), (a)(10), and (a)(17). Later, Respondents Cook and King were allowed to intervene as plaintiffs, and the United States Department of Health and Human Services (HHS) was joined as a necessary party.

On cross-motions for summary judgment, the district court held that Congress did not intend personal injury awards to be treated as income subject to the lump sum disqualification rule. Because all parties agreed that the term "income" is nowhere defined in the AFDC statute or regulations, the district court interpreted the word according to its ordinary and common meaning. In seeking a common usage and definition of the word "income," the district court appropriately viewed dictionary definitions as well as the definitions utilized by other agencies and courts.

Contrary to Petitioner's assertions, the district court did not *rely* on the definition of income in the federal income tax code to support its conclusion that personal injury awards are not income for AFDC purposes. The district court's review of United States Supreme Court opinions dealing with the tax code was "by way of analogy." *Reed* v. *Lukhard*, 591 F. Supp. 1247, 1256 (W.D. Va. 1984) (Pet. App. 48). The district court found it "instructive" that the Supreme Court, when seeking the intent of the creators of the "income" tax system in the Sixteenth

Amendment to the Constitution, held that the common meaning of "income" required realization of gain. *Id.* The district court concluded that Congress intended to limit the application of the lump sum income rule to only those lump sum payments that meet the ordinary meaning of income. *Id.* at 1257 (Pet. App. 50)

The district court also found fault with Virginia's regulatory scheme because people who receive compensation for property damage are not disqualified from the program for a fixed period of time, but people who receive compensation for a personal injury are. The district court utilized a limited "reasonable basis" standard of review to analyze Virginia's regulations. *Id.* at 1255 (Pet. App. 44).

In this context the district court described the anomalous results that the regulations commanded:

Example 1: Ms. H and her two children live in Roanoke and receive $255 AFDC each month. If Ms. H's home burns down and she receives a $20,000 insurance award, she may spend the insurance proceeds on anything she wants and as quickly as she wishes. She can reestablish her AFDC eligibility as soon as her countable resources fall below $600.00. However, if Ms. H's body is burned in a fire, and she receives $20,000 to compensate her loss, the money is treated as lump sum *income*. Ms. H and her children are disqualified from the AFDC program for almost 6 years [20,000 divided by 283 (the standard of need) = 70.67 months], even if the money is expended before that period ends.

Example 2: Ms. H's youngest child, Johnny, is a hit by a car and injured. Ms. H's insurance pays the child $1,000 for his injuries. The family can qualify for AFDC when their available

> resources fall below $600. On the other hand, if the driver's insurance company pays Johnny for his injuries, the money is treated as lump sum *income* and the family is disqualified from AFDC for 3 months and their benefits in the 4th month are reduced to $104.00 (1000 divided by 283 = 3.5 months. $151 of the lump sum remains in the 4th month and is subtracted from the $255 payment.)

Id. at 1254 (Pet. App. 42-43).

The court found that it is "irrational to treat a damaged car or home more favorably than a damaged body" and concluded that the federal and state interpretation of the lump sum income rule as inclusive of personal injury awards is unreasonable and cannot stand. *Id.* at 1257 (Pet. App. 51)

On appeal by Petitioner and the Secretary of HHS, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the district court in all respects. *Reed* v. *Lukhard*, 774 F.2d 1270, 1272 (4th Cir. 1985) (Pet. App. 5). With regard to the question of whether personal injury recoveries were income for purposes of applying the lump sum income rule, the Fourth Circuit found that, in adopting 42 U.S.C. § 602(a)(17), Congress intended to reach only payments that would ordinarily be considered income and not all large payments of money. 774 F.2d at 1273-75 (Pet. App. 14-17).

The court of appeals also held that Virginia's regulation, which applies the lump sum income rule to personal injury awards but not to property settlements, was arbitrary and inequitable and thus violated the AFDC equitable treatment regulation, 45 C.F.R. § 233.10(a)(1). 774 F.2d at 1275 (Pet. App. 16). The court of appeals said, "The AFDC program was designed to assist the needy; the

state by imposing inequitable eligibility requirements thwarts that purpose and runs afoul of regulations aimed at ensuring fair and unarbitrary treatment." *Id.*

The Petitioner, but not the Secretary of HHS, filed a Petition for Rehearing *en banc* with the Fourth Circuit, which was denied. The federal government also did not join in Petitioner's postjudgment motion to stay the mandate pending Virginia's application to this Court for a writ of *certiorari*. That motion was granted by the Fourth Circuit on November 21, 1985. The Secretary of HHS did not petition this Court for a writ of *certiorari* and expressly waived his right to file a response to the petition filed by Virginia DSS, by a waiver filed February 19, 1986.

On March 18, 1986, only one month after its waiver, HHS issued a new final regulation that requires all states to treat "windfalls" as lump sum income. Unlike the proposed regulations, which had been published sixteen months earlier and had not discussed personal injury awards, the final regulation specifically defines "income" as including personal injury awards. *Compare* 49 Fed. Reg. 45561, 45567-68 (Nov. 16, 1984) *with* 51 Fed. Reg. 9191, 9196-97 (March 18, 1986) (to be codified at 45 C.F.R. § 233.20(a)(3)(ii)(F) (J.A. 82-86).[2]

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[2] It is plainly self-serving for the Secretary of HHS (who has been involved in extensive litigation concerning the definition of "income" for the lump sum rule) to determine in 1986, in the midst of the litigation, that requiring the treatment of personal injury awards as lump sum income is what Congress intended in 1981. Since the federal regulation was not published in final form until five months after the Fourth Circuit's decision, it was not considered below. HHS claims the new regulations is entitled to deference (HHS Brief 16) and that it moots respondents' equitable treatment claim (HHS Brief 18-19). Respondents' position is that no deference is owed to the *post hoc* regulation because it is contrary to the statute, legislative intent,

At this Court's direction, HHS later filed a response to Virginia's petition, which supported the granting of a writ of *certiorari*. This Court granted Virginia a writ of *certiorari* on June 23, 1986.

In HHS's brief on the merits, the Secretary introduces a new issue into this case by "interpreting" his March, 1986, regulation as requiring all states to treat property loss payments as lump sum income (HHS Brief, 9-10, 18-19). This interpretation was neither discussed nor contained in the proposed or in the final regulations and was neither mentioned nor adopted in Virginia's brief on the merits.

SUMMARY OF ARGUMENT

The lump sum income rule, adopted by Congress in 1981, explicitly applies only to receipts of "income," not to "resources." Nothing in the statute or the legislative history suggests any congressional intent to modify the long-standing meaning of "income" and "resources" in the AFDC program.

When the lump sum income rule was adopted, neither the statute nor regulations defined the word "income." It is therefore appropriate and necessary to look at that word's common meaning to derive Congress' intent in adopting the rule. In common usage, as well as in numer-

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prior positions of the agency and because it was promulgated in violation of the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 553 *et seq.* (APA). *See* Argument Section ID, *infra*. If this Court accords any significance to this new regulation, it would be appropriate to remand this case so that the validity of its substance and promulgation can be fully considered. To validate the regulation here in the first instance would be extraordinary. *See EPA* v. *Brown*, 431 U.S. 99, 104 (1977).

ous examples in other contexts, personal injury awards, which compensate an individual for damage to one's body, are not "income," because no gain occurs. This principle is also embodied in the common law, which requires that personal injury awards do no more than compensate the victim for the injury actually sustained.

The legislative history of § 602(a)(17) is consistent with an understanding of the term "income" that excludes personal injury awards. The final committee reports specify that the new rule is to apply only to "payments which meet the definition of income." The reports use as the single example of lump sum income "retroactive social security benefits"—precisely the kind of payment historically defined by HHS as "lump sum income."

The Secretary's pre-OBRA definition of income included lump sums representing accumulated gain (such as retroactive social security payments) but did not include compensatory awards. By using the term "income" in § 602(a)(17), it must be presumed that Congress intended this definition to be followed when it adopted the lump sum income rule in 1981.

HHS has offered conflicting interpretations of the scope of the lump sum income rule since its enactment in 1981. These shifting interpretations culminate in the new regulation just issued in March, 1986, and, even further, in the Secretary's interpretation of the new regulation contained in the brief filed by HHS in this case. The Secretary's current position is not entitled to any deference because it conflicts with the statutory language and its legislative history, as well as longstanding AFDC policy.

The recent regulation defining personal injury awards as "income" subject to the lump sum penalty is also not entitled to deference because it was promulgated in viola-

tion of the Administrative Procedure Act. There was no notice in the proposed regulation that the agency was considering this definitional change. The proposed regulation only addressed "windfalls" and the words "personal injury" were never mentioned.

The Secretary (until filing his brief here) and Virginia have acknowledged throughout this litigation that the lump sum income rule does not apply to every large payment of money. Indeed, Virginia's state regulations incorporate numerous examples of the kinds of payments that fall outside the scope of the lump sum income rule, such as payments for property damage and payments from insurance policies owned by families.

There is no justification for Virginia's punitive treatment of a personal injury award as income while money received for property damage is treated as a resource. Virginia's regulatory scheme creates an irrational system that contravenes the Social Security Act and its regulatory requirements that prohibit arbitrary and inequitable eligibility conditions, 45 C.F.R. § 233.10(a)(1).

The decisions below correctly construed Congressional intent to incorporate in § 602(a)(17) the settled meaning of the term "income," which excludes personal injury awards. They are consistent with more that twenty-five years of federal AFDC policy related to income and resources. These decisions support the equitable treatment of recipients. The judgment of the Fourth Circuit opinion should be affirmed.

ARGUMENT

I. VIRGINIA'S TREATMENT OF PERSONAL INJURY AWARDS AS "INCOME" VIOLATES THE SOCIAL SECURITY ACT

Introduction

This Court has recently analyzed another AFDC amendment adopted in the OBRA legislation. *Heckler* v.

Turner, 105 S.Ct. 1138 (1985). In resolving the question of statutory construction presented in *Turner*, this Court looked to three sources of authority: (1) the "common sense meaning" of the statutory terms used; (2) the legislative history of the provision; and (3) "the Secretary's longstanding definition of the term. . . [that] . . . [t]he OBRA Congress must have had . . . in mind when it reemployed the term in [the amendment at issue]." *Id.* at 1144. Application of the same analysis here results in the conclusion that Congress did not intend the lump sum income rule to apply to personal injury awards.

A. *Plain And Ordinary Meaning Of "Income"*

The statute expressly applies the extended disqualification provision of the lump sum rule to "income" and not to "resources." (Pet. App. 63). "Absent a clear indication of legislative intent to the contrary, the statutory language controls its construction." *Ford Motor Credit Co.* v. *Cenance*, 452 U.S. 155, 158 n.3 (1981). Here Congress chose to effectuate its purposes in enacting the lump sum rule by using the term "income."

Because Congress has never established a working definition for "income" particular to the public assistance statute, the word "income" must be interpreted according to its ordinary, contemporary, common sense meaning. *Turner*, 105 S.Ct. at 1144; *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981); *Accord*, *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). "[L]egislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U.S. 1, 9 (1962).

The meaning of income in ordinary and common dictionary definitions, in numerous administrative contexts, and in our common law has never included the type of payments received by respondents.

Dictionaries are the most authoritative source for understanding the "ordinary meaning" of words, and the definitions they offer simply do not permit a construction of the term "income" that could include a compensatory personal injury award. Leading dictionaries define income as involving a "gain," a concept that excludes the receipt of money as compensation for injuries suffered. *See, e.g., Webster's Third International Dictionary of the English Lauguage* (1976) ("a gain or recurrent benefit that is usually measured in money for a given period of time"); *Black's Law Dictionary* (rev. 5th ed.1979) ("the gain derived from capital, from labor or effort, or both combined, . . . the true increase in amount of wealth which comes to a person during a stated period of time"). *See also*, 42 *C.J.S.* Income § 531 ("In common speech 'income' generally is understood as gain or profit"). None of these definitions apply to the receipt of a personal injury award that compensates the individual for damages suffered.

It is also instructive to look to other statutes in which Congress has characterized personal injury awards to determine if such payments are "income" or "resources." *C.f. Overstreet* v. *North Shore Corp.*, 318 U.S. 125 (1943) (comparing different statutes that each use the term "engaged in commerce" to define the term's meaning). The Internal Revenue Service excludes from income those amounts or sums of money received in personal injury settlements, thus recognizing that compensation for personal injury does not represent any gain to the injured party. The Internal Revenue Code, 26 U.S.C. § 104, clearly states that gross income does *not* include "the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." This provision is based upon the pronouncements of this Court for over seventy years.

The specific exclusion of injury awards in § 104(a)(2) of the Internal Revenue Code can be traced to Congress' concern in 1918 that personal injury damages were not income within the meaning of the Sixteenth Amendment. The House Report that explains the intent of the amendment provides:

> Under present law it is doubtful whether amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for injury or sickness, and damages received on account of such injuries or sickness are required to be included in gross income. The proposed bill provides that *such amounts shall not be included in gross income.*

(emphasis added) H.R. Rep. No. 767, 65th Cong., 2d Sess. 9-10 (1918). This indicates that the statutory exemption created in 1918 was based upon the belief that injury awards were not income in the first place.

In 1919 the Court reiterated what it believed was "income":

> Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. . .

Eisner v. *Macomber*, 252 U.S. 189, 207 (1919), *quoting Stratton's Independence* v. *Howbert*, 231 U.S. 399, 415 (1913) *and Doyle* v. *Mitchell Bros. Co.*, 247 U.S. 179, 185 (1918). This Court later reiterated that "[D]amages for personal injury are by definition compensatory only." *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 432 n.8 (1955).

Federal administrative constructions of the term "income" for purposes of various federal social welfare programs are similar. For example, HHS does not con-

sider personal injury awards in evaluating income against the official federal poverty lines. In its Annual Revision of Poverty Income Guidelines HHS states:

> For eligibility purposes, income does not refer to the following money receipts . . . one time insurance payments, or compensation for injury.

48 Fed. Reg. 7010, 7011 (Feb. 17, 1983).

Similarly, the food stamp program, administered by the Department of Agriculture, Food and Nutrition Services, specifically designates "lump sum payments" as a "resource" and not "income." 7 U.S.C. § 2014(d)(8); 7 C.F.R. § 273.9(c)(8). This treatment of personal injury awards in the food stamp program, another major needs based program, provides a useful example of the common useage and meaning of the terms "income" and "resources."

A measurable gain to the individual is the common thread among these dictionary, judicial, congressional, and federal administrative definitions. If amounts received by an individual are to be considered income, then the recipient's financial worth must have increased. Conversely, if there is no gain to the individual, or if the amounts received serve merely to replace a loss which has been sustained, then those amounts are not income as defined above.

The personal injury awards received by respondents are properly and logically defined as a resource. A common definition of "resource" is "a source of supply or support; a natural source of wealth or revenue." *Webster's New Collegiate Dictionary* (1981). One's healthy body is certainly an excellent example of a resource. And compensation for loss of or damage to one's body, car, or home,

all squarely fall under the resources category—not the income category.

In addition to dictionary and administrative definitions of income, our common law and history of jurisprudence have long recognized that compensation for personal injury does not represent any gain to the injured party. Instead, such payments represent an attempt to return that party to the *status quo ante*, and "should in all cases be commensurate with the loss or injury sustained." 22 *Am. Jur. 2d* Damages § 85 n.3. As a matter of history and policy it is basic in the common law that personal injury awards do no more than compensate the victim for the injury actually sustained. *Milwaukee & St. P.R. Co.* v. *Arms*, 91 U.S. 489, 495 (1875); *McDermott* v. *Severe*, 202 U.S. 600, 611 (1906) [compensation for mental anxiety is limited to the direct consequences of the physical injury]. The victim receives no profit or gain.

A judgment in a personal injury action must be considered a substitution for wholeness of body. As this Court has long recognized, the personal injury settlement or judgment is calculated to reimburse the injured party for actual medical expenses and fees, and also to pay compensation for the intangible—yet very real—pain, suffering, and metal anguish experienced by the individual. *Chesapeake & O. Ry. Co.* v. *Carnahan*, 241 U.S. 241, 244 (1916) [for future results of injury]; *Southwestern Brewery & Ice Co.* v. *Schmidt*, 226 U.S. 162, 169 (1912) [future pain and disfigurement]; *Kennon* v. *Gilmer*, 131 U.S. 22, 26 (1889) [mental suffering]; *The City of Panama*, 101 U.S. 453, 464 (1879) [permanent injury]; *The Washington*, 76 U.S. 513, 515 (1869) [permanent disability and intense pain].

Virginia law follows this common law and clearly recognizes these aspects of a compensatory award. *See, e.g.*,

Lilley v. *Simmons*, 108 S.E.2d 245, 200 Va. 791 (1959); *McGowan* v. *Taxman*, 132 S.E. 316, 144 Va. 358 (1926). The Virginia Model Jury Instructions provide that "full and fair compensation" for damages sustained include payment for the following items: bodily injuries, effect upon health, physical pain, mental anguish, future pain and mental anguish, disfigurement or deformity and any associated humiliation or embarrassment, inconvenience and discomfort (past and future), medical bills, future medical bills, and loss of earnings or loss of earning capacity. Doubles, Emroch & Merhige, *Virginia Jury Instructions* § 23.01 at 148-49 (1974). Numerous cases discuss these items. *See, e.g.*, *Bell* v. *Kirby*, 226 Va. 641, 311 S.E. 2d 799 (1984). *Todt* v. *Shaw*, 223 Va. 123, 286 S.E. 2d 211 (1982), *Beasley* v. *Bosschermuller*, 206 Va. 360, 143 S.E. 2d 881 (1965); In fact, Virginia law allows a jury to infer pain and mental anguish from bodily injury. *Bruce* v. *Madden*, 208 Va. 636, 160 S.E. 2d 137 (1968).

Thus, the entire amount of the awards received by respondents compensate them for the *full* extent of their injuries—not just for out of pocket losses. Virginia's suggestion that the amount left over after expenses are paid is not compensatory is simply wrong.

Virginia and HHS reject the principle that one's body is an asset, subject to conversion into cash. But as one commentator has stated:

> The prime purpose of damages in tort actions is to compensate a person for injury caused by another's wrongful conduct and, to the extent possible, restore the injured party to the position that would have been occupied had the wrong not occurred—to make the injured party whole again. The basic principle of damages is compensation for actual loss, and the injured party is usually entitled to only an amount which will reimburse him. Obviously in matters such

> as pain and suffering, disfigurement and loss of bodily function the determination of the amount of damages requires a primarily subjective evaluation. It is the trial attorney's task to translate these damages into monetary equivalents.

Minzer, *Damages in Tort Actions* § 1.02. *See also Hahn* v. *Atlantic Richfield Co.*, 625 F.2d 1095, 1104 (3d Cir. 1980) ("If injury occurs, tort law attempts to place the injured party in the *same* position he occupied before the injury.") (emphasis added), *cert. denied*, 450 U.S. 981 (1981).

These principles set forth our judicial system's recognition that there is no way actually to replace or repair the damage to the injured party except through the payment of dollars and cents. Relying on these principles, the Court of Appeals for the Third Circuit concluded that personal injury awards are not "windfalls" that disqualify recipients under Pennsylvania's AFDC lump sum rule. *Barnes* v. *Cohen*, 749 F.2d 1009, 1017-18 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 2126 (1985).

Virginia and HHS ask this Court to read the statute in a manner that not only rejects the common sense meaning of "income" but also in a manner that contravenes fundamental precepts of the common law. This conflicts with another principle of statutory construction that requires all statutes to be read "in the light of the common law." *United States* v. *Sanges*, 144 U.S. 310, 311 (1892). Absent specific evidence to the contrary, this Court reads statutes in harmony with the common law of the states. *Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976) [§ 1983 is to be read in harmony with general principles of tort immunity and defenses rather than in derogation of them.] In doing so, the Court has assumed that members of Congress are familiar with common-law principles, and that Congress intended these common law principles to apply,

absent specific provisions to the contrary. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

It must be assumed, therefore, absent evidence to the contrary, that Congress did not mean by its use of the common term "income" to contravene the above common law principles. Nothing exists that indicates Congressional intent to abrogate the traditional rule that personal injury awards are not income. Neither the statute nor its legislative history mention personal injury awards, and, in fact, the legislative history shows that the rule is to apply only to payments which "meet the definition of income."[3]

Respondents have received monetary compensation for losses sustained when they were injured. The fundamental requisite for income—the element of a gain or profit—is lacking. Under a common-sense reading of the statute that is consistent with common law, respondents cannot be said to have received "income." The lump sum income rule does not apply to them.[4]

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[3] See, discussion of legislative history, *infra*, Section IB.

[4] In *Watkins* v. *Blinzinger*, 789 F.2d 474 (7th Cir. 1986), *petition for cert. filed*, (August 1986), the Seventh Circuit ignored the common meaning of the term "income" and the purpose of compensatory awards in our judicial system. Using a strained economic analysis, the court determined that a personal injury award is properly "income" because "it may be spent." *Id.* at 476. The "spendability" of an award, however, does not determine its character. While all money "can be spent," not all lump sums are treated as income in the AFDC program.

The Seventh Circuit justified its departure from established definitions by making analogies between personal injury award recipients and wage earners, football players, blood and kidney donors, and experimental and drug testing volunteers. *Id.* at 477. The court's analogies, however, are misleading and inappropriate because the

B. *Legislative History*

The scant legislative history of the lump sum rule is consistent with an understanding of the term "income" that excludes personal injury awards. The Senate Finance Committee Report describes the rule as follows:

> Under present law, *any payments that meet the definition of income* (e.g., retroactive social security benefits) are counted as income in the month of receipt and any of the payment that is not spent in that month is usually considered a resource in the month thereafter. The committee amendment would require that large payments, together with *other income* remaining after the application of disregards, be considered available to meet ongoing needs in the AFDC program. If such income exceeds the standard of need, the household would be ineligible for aid.

(emphasis added) S. Rep. No. 97-139, 97th Cong., 1st Sess. 436, *reprinted in* 1981 U.S. Code Cong. & Ad. News 693, 702 (J.A. 24). The report of the House Ways and Means Committee is to the same effect (J.A. 75).

These reports reveal Congress' intent to reach only those payments in the OBRA lump sum rule that would ordinarily be considered income, not all large payments of money. In the statement of the current law which is to be

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individuals in the examples all voluntarily earned money. Wages are traditionally and commonly defined as "income." Compensation for personal injuries, on the other hand, are neither voluntary nor earned.

Compensation for a personal injury award also differs because it is not bargained for in advance. When a professional athlete plays football with pain, he has contracted for a salary in advance and has decided that his prospects for gain greatly exceed his potential for loss. By contrast, respondents were injured unexpectedly in accidents. The two situations are entirely different.

changed, the explicit reference to "payments that meet the definition of income" demonstrates that Congress was well aware that some lump sum payments did not constitute "income" in the AFDC program, and that only payments defined as income would be affected by the new OBRA rule.

Likewise, in the description of the amendment, the language that links "large payments" together with "*other income*" reinforces the conclusion that only large payments of "income" are covered by the new rule. The reading of these reports urged by Virginia and HHS, that Congress meant to define *all* lump sums as "income," renders these express references superfluous.

That personal injury awards would not be covered by the new rule is made plain by the single example used in the final conference report of the kind of payment to be covered by the new rule—"retroactive social security benefits." This is precisely the type of payment that historically has been viewed by HHS and its predecessors as falling into the "income" category.[5] Thus, Congress expressly limited the scope of the rule to payments representing accumulated gain, and chose the word "income" in the statute to effect its purpose.

Virginia and the Secretary ask this Court to ignore the plain statutory language and the pertinent committee reports. They focus instead on descriptions by Secretary Schweiker (then Secretary of HHS) of the draft bill amending the Social Security Act in 1981. However, the Secretary's expressed intentions at the time OBRA was passed do not support his current contention that the

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[5] See, discussion of the pre-OBRA agency definition of "income," Argument Section IC, *infra*.

lump sum rule was intended to apply to personal injury awards. Indeed, the Secretary is unable to identify one clear expression of such an intent. Virginia and the Secretary make much of the solitary reference in his summary of the draft bill to the term "insurance proceeds," suggesting that it was an expression of agency intent to apply the lump sum rule to personal injury awards. But the paragraph in which this reference is contained appears under the title "Treatment of *Income* in Excess of the Standard of Need," (emphasis added) (Pet. App. 93). This clearly signifies that only insurance proceeds which constitute income are subject to the rule.

Proceeds from a home insurance policy, paid after a fire to replace a resource, have not been subject to the lump sum income rule under Virginia or HHS policies, precisely because they do not represent "income" to the recipient. Even if all "insurance proceeds" were subject to the lump sum rule, the term "insurance proceeds" cannot be equated with "personal injury awards." A recipient who receives a personal injury award may or may not receive the award from an insurance company of the tortfeasor. He may be just as likely to receive it directly from the tortfeasor or some other person.

It is also significant that neither the House nor Senate reports mentions "insurance proceeds" as an example of lump sum income. Although the committee reports adopted much of the Secretary's language in describing the scope of the lump sum rule, the absence of any reference to insurance proceeds cannot be overlooked and must be considered indicative of Congress' intent. Nowhere in the committee reports are "insurance proceeds" even mentioned.

Finally, contrary to the interpretation which Virginia and HHS now urge, until only a few months ago, HHS has

never required that all states treat all insurance proceeds as lump sum income. Consistent with the principle that proceeds from any conversion of property are not income, Virginia has always treated property insurance proceeds as a resource. Thus, the Secretary's statements in May, 1981, were not adopted by Congress, Virginia, *or* HHS.

C. *The Agency Pre-OBRA Definition*

The Secretary's own longstanding and consistent definition of the term "income" in the AFDC program strongly supports the conclusion that personal injury awards are not subject to the lump sum income rule. For at least twenty-five years preceding the OBRA amendments, the only kinds of payments that HHS and its predecessors consistently *defined* as "income" were those payments that represent accumulated gain, such as retroactive social security benefits. On the other hand, the federal agency did not define compensatory payments—such as personal injury awards—as income. Congress must be presumed to have been aware of these established definitions when it adopted the lump sum income rule in 1981. *Heckler* v. *Turner,* 105 S.Ct. at 1144; *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran,* 456 U.S. 353, 382, n.66 (1966).

The agency's pre-OBRA definition of "income" is found in several documents. In 1957, HHS's predecessor, the Department of Health, Education and Welfare ("HEW") was requested to explain its position on a state policy similar to the present $1,000 resource limit. The state allowed public assistance recipients to accumulate a personal property reserve of either $300 or $600, derived from sources such as retroactive social security benefits, insurance, and industrial compensation payments. Handbook of Public Assistance, Part IV, S-3120, Supplement

for Administrative Use (Sept. 6, 1957) (hereinafter "Handbook") (J.A. 58).

In offering an opinion on this policy, HEW used the term "lump-sum" to mean a payment that does not constitute income and therefore could be retained as resources in the personal property reserve:

> For example, the initial retroactive [Social Security] payment representing an accumulation of current monthly benefits would not under Bureau policy represent a "lump-sum". In a like fashion, industrial compensation payments representing accumulated weekly amounts would not be thought of as "lump-sum" payments. On the other hand, a settlement of industrial compensation as the result of loss of hand or foot might represent a "lump-sum" payment.

Id.

It is clear from this usage that "lump-sum" is used to mean a payment that is not income, as opposed to a single payment of monthly benefits that may arrive in one lump payment but is really income. Thus the only logical meaning of "lump-sum" as used here is a payment that is *not* income.[6]

In these examples offered by HEW, both the retroactive social security benefits and accumulated workers compensation payments are income; the social security payment is an accumulation of monthly benefits and the workers compensation is an accumulation of weekly bene-

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[6] In its brief, HHS makes much ado about the wording in the 1957 Handbook that a settlement of industrial compensation "might" be a lump sum payment which is not income. The significance of this quotation is that while retroactive payments representing weekly or monthly amounts were, as agency policy, *defined* as income, compensatory awards were not so defined.

fits paid for lost wages. In contrast, the compensation payment for loss of hand or foot—which HEW states could be retained in the personal property reserve—is *not* income. If it were income it could not have been offered as an example of money retainable in the resource reserve.

Sixteen years later, in June, 1973, the Office of General Counsel stated that this Handbook provision continued to reflect *current* policy (J.A. 55-56) ("It is clear from the explanation in Handbook IV-S-3120 that an initial OASDI payment representing an accumulation of current monthly benefits. . . is to be treated . . .as current income. This interpretation still reflects current policy . . . .").

HEW once again used injury awards as an example of lump sums that are not income in an *amicus* brief submitted in *Lockhardt* v. *Harden*, No. C74-390A (N.D. Ga. 1974). *See* excerpt from Brief on Behalf of United States as Amicus Curiae (J.A. 60).

The plaintiff in *Lockhardt* argued that a lump-sum payment of child support should not have been treated as income because it was not regularly recurring. *Id.* at 10. In rejecting as too restrictive the notion that only regularly recurring payments are income, HEW explained its own distinction between lump sums that are properly treated as income and those which are treated as resources.

As a contrast to lump-sums such as retroactive social security benefits that are income by definition, HEW offered the example of an injury award. Discussing social security benefits, HEW explained,

> The Secretary, however, has traditionally interpreted the regulation as requiring that such a lump-sum payment (*as opposed to a "true" lump-sum payment such as an award for damages*) be treated as

> income in the month received . . .and any portion then remaining be treated as a reserve in the following month.

Id. at 10 (emphasis added).

Thus, HEW stated that payments of retroactive social security benefits are *by definition* income and must be treated as such by states. An award for damages did not meet this definition and was treated as a resource. These distinctions offered by HEW in its Handbook and in the *Lockhardt* brief utilize the same common definition of the word "income" that was discussed previously. When gain occurs, income is realized—compensatory payments are not income.

In compliance with these pre-OBRA federal policies, Virginia treated the receipt of personal injury awards as a *resource* and counted the lump-sum in relation to the $600 limitation. ADC Manual § 303.5 (J.A. 23). On the other hand, Virginia's regulations that related to the treatment of "income" contained no reference to personal injury awards.

Thus, it must be presumed that Congress, when enacting § 602(a)(17) in 1981, knew of HHS's consistent position that personal injury awards were *not* defined as income. By limiting the scope of the rule to "income," and by specifying in Committee reports that the rule affected only "payments that meet the definition of income (e.g., retroactive social security benefits)," Congress made clear its intent that the lump sum provision would not apply to personal injury awards.[7]

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[7] The Secretary has not disputed that the agency's established definition of "income" prior to OBRA did not include compensatory awards. Yet he claims that states have been allowed to treat such awards as either "income" or "resources." (HHS brief, p. 15). But this

By limiting the application of the amendment to receipts of "income", Congress achieved the purposes of the lump sum rule—to encourage recipients to budget large sums of "income" to meet needs over a longer period of time and thereby reduce federal expenditures for the AFDC program.

In fact, the cost-savings goals of the OBRA amendments may be undermined by the interpretation advanced by Virginia and HHS. Additional expenditures for the welfare programs may result because there is no incentive for victims to bring personal injury cases. The victim receives no compensation for injuries or pain since the agency requires the use of the funds—dollar for dollar—in lieu of AFDC. People who are aware of this result may ignore their rightful claims for redress because there is no reason to pursue them.

The government could actually lose a significant source of revenue because personal injury awards are used to reimburse the Medicaid program for medical treatment provided victims of injury. If there is no incentive for bringing personal injury suits, this significant source of third party payment for Medicaid expenditures may shrink. Only the tort defendant would benefit.

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hardly helps the Secretary. First, there is no evidence in the record which documents the existence of a pre-OBRA option. With the exception of the word "might" in the 1957 Handbook provision, Virginia and HHS can only point to post-OBRA documents in support of its claim that an "option" was permissible (Pet. Brief, 4 n.2, 12). If an option did exist, some states (unlike Virginia) may have treated personal injury awards as income, but that does not change the longstanding *federal* definition of income that Congress presumably accepted when it passed OBRA.

D. *Weight To Be Given The Agency Interpretation*

The Secretary seeks to deflect the force of his pre-OBRA definition by suggesting that deference is owed to his new lump sum regulation, 51 Fed. Reg. 9191, 9196-97 (March 18, 1986) (J.A. 86), which classifies *all* large payments of money, including personal injury awards, as "income" subject to the lump sum rule. While courts generally should give deference to agencies' interpretations of statutory language, such deference is neither so uncritical nor so absolute as HHS asserts.[8] The weight to be accorded the agency's interpretation in this type of case, "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which gave it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

HHS's new regulation is not entitled to deference here for the same reasons this Court rejected the agency inter-

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[8] Cases cited by HHS such as *United States* v. *Morton*, 467 U.S. 822 (1984), and *Atkins* v. *Rivera*, 106 S.Ct. 2456 (1986) involve explicit statutory delegations to the agency to define terms. *Morton*, 467 U.S. at 834; *Atkins*, 106 S.Ct. at 2461. The administrative interpretations were given legislative effect and controlling weight. That principle does not apply here, since Congress did not specifically delegate to HHS the authority to define or redefine "income" when it adopted the lump sum income rule in 1981. This case is also unlike *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which involved the interpretation of a complex new concept about which the agency has special expertise. Instead it is an amendment to an existing statute. The word "income" appears elsewhere in the statute, and the agency has previously interpreted the term. It must be assumed that Congress intended the same definition to apply to the amendment.

pretation in *General Electric* v. *Gilbert*, 429 U.S. 125 (1976). In *Gilbert*, the guideline was promulgated by the agency eight years after the statutory enactment. It was rejected because it flatly contradicted earlier agency pronouncements concerning the same issue. *Id.* at 142-43. The new guideline also conflicted with other indicia of the statute's proper interpretation including the "plain meaning" of the statutory language. *Id.* at 145.

Here, HHS has promulgated a regulation five years after the statutory enactment. The new regulation conflicts with the common-sense meaning of the statutory language used. Furthermore, the Secretary has failed entirely to provide a consistent interpretation of the lump sum amendment. Indeed, since its 1981 enactment, the agency has flip-flopped its position several times. A review of the various conflicting positions HHS has taken over the past five years highlights the agency's inconsistencies and shows why the new regulation should be rejected:

In both the interim and final regulations implementing the OBRA amendments, the lump sum rule applied only to "income" and not "resources." 47 Fed. Reg. 5675 (Feb. 5, 1982) (Pet. App. 68) In these final regulations, the Secretary maintained the longstanding definition of "income" by utilizing "retroactive Social Security Benefits" as the *agency's* single example of payments affected by the lump sum income rule. *Id.* at 5655. The Secretary also noted that Congress had not specified that any change be made in the states' existing practices in defining "income." *Id.* at 5656.

In discussing another OBRA provision regarding resources, the Secretary reaffirmed that the conversion of a "resource" into cash results in "resources," not income:

> Comment: one commenter questioned whether money received from the sale of allowable resources is exempt.
>
> Answer: As the term resources includes non-liquid assets, the change from a non-liquid asset, e.g., a bicycle valued at $50 to cash of $50 through the sale of that asset, does not change the total value of the assets held and such resource would be exempt if the allowable statutory amount were not exceeded.

Id. at 5657.

Later, in policy memoranda, HHS took a new position that states had an *option* to treat personal injury awards as either resources or as income subject to the lump sum income rule. As early as April 1982, some states were advised of this option. *See* Letter from Acting Regional Commissioner (April 8, 1982) ("damage claims settlements may be considered at the state's option either as income subject to [the OBRA lump-sum rule] or as a resource only") (J.A. 62). More than a year later HHS advised a Congressman of the option. *See* HHS Memo regarding letter from Congressman Douglas H. Bosco (July 6, 1983) (J.A. 46-47).

However, petitioner presented evidence below which indicated that Virginia was not advised about an option until October, 1983 (J.A. 66-67). Prior to that time, the same federal official had advised Virginia that the lump sum rule *had* to apply to accident settlements. *See* Affidavit of Connie Hall, (Jan. 24, 1984) (Record Appendix 134, 163-164).

Effective October 1, 1984, Congress amended 42 U.S.C. § 602(a)(17) to allow states to shorten the disqualifications imposed under the lump sum income rule under certain hardship situations. Pub. L. 98-369, § 2632. In this amendment, Congress also clarified that the lump

sum income rule applied to families whether or not they had earned income,[9] but no change was made to extend the scope of the rule to anything but lump sums of "income." Likewise, the Secretary's regulations which implemented these 1984 statutory amendments continued to refer only to "lump sum income." 45 C.F.R. § 233.20(a)(3)(ii)(F); 49 Fed. Reg. 35600 (Sept. 10, 1984) (Pet. App. 69).

Two months later, without any direction or authorization from Congress, and while this litigation and similar cases around the country were pending, the Secretary proposed new regulations to revise his interpretation once again. 49 Fed. Reg. 45558 (Nov. 14, 1984) (J.A. 79). The proposed regulations would require states to treat all "windfall" payments as income. While maintaining his longstanding definition of retroactive benefit payments as "income" in the preamble to these proposed regulations, the Secretary defines "windfalls" as follows:

> A windfall is a sum that is not earned, does not occur on a regular basis, and does not represent accumulated monthly income received in a single sum. A windfall might come from an inheritance, lottery winnings, or an income tax refund, but not title II Social Security or VA benefits . . .

(J.A. 79).

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[9] The Courts of Appeal for the First and Sixth Circuits had ruled that the lump sum rule applied to all families on AFDC whether or not family members had earned income. *Walker* v. *Adams*, *741 F.2d 116, 120 (6th Cir. 1984) Sweeney* v. *Murray*, 732 F.2d 1022, 1030 (1st Cir. 1984). The Secretary misstates the holding in *Walker* (HHS Brief 17). The Sixth Circuit neither considered nor evaluated whether insurance settlements are income in the AFDC program. The case involved an entirely different question, i.e. whether the rule applied to families without earned income.

In the language of the proposed regulation itself, the Secretary included "inheritances or lottery winnings" as the only two examples of "windfall" payments which must be treated as lump sum income (J.A. 81). The treatment of personal injury awards was not referred to in any way in these proposals, although litigation on that question was pending around the country.

Nine days later the Court of Appeals for the Third Circuit specifically held that under Pennsylvania law personal injury awards could *not* be defined as "windfalls" and could, therefore, not be considered lump sum income under Pennsylvania's AFDC regulations which applied the lump sum rule only to accumulated income and "windfalls." *Barnes* v. *Cohen*, 749 F.2d 1009, 1017-18 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 2126 (1985).

For more than one year, the Secretary took no action on his proposed regulations. When the final regulation was issued sixteen months later (and after the petition for a writ of *certiorari* was filed by Virginia in this case), the description and language of the amended lump sum rule was drastically different from the original proposal: "personal injury awards" were specifically included as an example of "windfalls" which had to be treated as lump sum income by all states. 45 C.F.R. § 233.20(a)(3)(ii)(F). 50 Fed. Reg. 9205 (March 18, 1986) (J.A. 86). The only explanation for the change is that in "reviewing the legislative history of OBRA, we believe that the Congress [in 1981] intended all lump sum payments (including windfalls) to be treated as income under the AFDC program." *Id.*

The last revision in the Secretary's various interpretations of the lump sum rule was expressed in his brief filed in this case. There, the Secretary states that the new

lump sum income regulation applies to casualty loss payments as well as personal injury awards. (HHS Brief 9-10, 18-19). This interpretation has never before been mentioned or suggested by the agency, and it is unsupportable. Even the Petitioner's brief on the merits makes no mention that the new regulations effect such a change. Virginia states throughout its brief that money from property is a resource. (Petitioner's Brief 3, 19, 22)[10]

This new position totally contradicts previous policy statements issued by the agency that money received due to the loss or sale of real or personal property is a *resource*. The question of the character of money received upon sale of a resource was specifically addressed by HHS in the "Supplementary Information" published in the Federal Register with the final AFDC regulations implementing the OBRA amendments concerning resources. *See* 47 Fed. Reg. 5657 (Feb. 5, 1982) (quoted above). This policy has been upheld by at least one court, *Rochford* v. *Affleck*, No. 82-0470 (D.R.I. 1982) (consent order) (lump sum income rule is not applicable to proceeds from the sale of real or personal property—such proceeds are treated as "resources" for AFDC purposes) (Res. App. 1a)

In November, 1982, Virginia DSS inquired of HHS whether the Rhode Island consent decree reflected federal policy. The response from HHS contains the following explanation:

> Situation: The State of Rhode Island Court recently ruled that the proceeds from the sale of real or per-

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[10] The government's interpretation of its new regulations raised issues which have not been addressed by any party at any time in this litigation. In response to the interjection of this new issue, respondents have included material in an appendix to this brief (Res. Brief App.).

> sonal property has to be treated as a resource rather than as Lump Sum Income when determining AFDC eligibility.
>
> Question: What is the federal interpretation of the regulation under 45 C.F.R. 233.20(2)(3) which discusses the treatment of real and personal property?
>
> Answer: Under current Federal policy, real or personal property if sold is considered a converted resource rather than a lump sum payment. . . .

HHS Memo to Virginia DSS (Nov. 15, 1982) (Res. App. 6a). Since the sale of a resource results in a money resource, casualty loss payments for the loss of property, must, also, result in the receipt of a resource. The position taken in HHS's brief is absolutely unsupportable as a statement of new policy.

In sum, the Secretary's numerous policy interpretations since the enactment of OBRA contradict each other, as well as the pre-OBRA agency interpretation. Indeed, even while seeking deference from this Court, the Secretary is taking inconsistent positions. First, he claims that as the agency intimately involved in the drafting and adoption of the OBRA amendments in 1981, HHS's interpretation of the lump sum rule is entitled to special deference. Now, five years later, he replaces the agency's first interpretation with a new one which contradicts the first. No deference to the agency is warranted under these circumstances. *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 142-145 (1976); *Haggar* v. *Helvering*, 308 U.S. 389, 398 (1940) (refusing to give "persuasive force to an administrative construction" of a statute where, *inter alia*, the administrative "regulations have not been consistent in their interpretation of the statute"); Sands, *Sutherland Statutory Construction*, § 49.05 (4th ed. 1984) (If the administrative construction has not been uniform, "the

rule which attaches great weight to administrative interpretation is inapplicable.)

The only agency interpretation which is entitled to deference here is the longstanding federal interpretation that defines retroactive social security benefits as income. This policy was followed for at least two decades prior to the OBRA amendments and was reaffirmed by Congress in 1981. *See Young* v. *Community Nutrition Institute*, 106 S.Ct. 2360 (1986) (deference given agency interpretation in place for more than 40 years); *Aluminum Co.* v. *Central Lincoln Utility District*, 467 U.S. 380, 390 (1983) (deference to the agency was appropriate because the subject under regulation was technical and complex, and the agency had maintained a consistent interpretation of the statute since its enactment).

In addition to the above, the regulation should be rejected because it was not properly promulgated. Agency regulations, as incorporating agency opinions, are traditionally entitled to the most deference, and for good reason—the Administrative Procedure Act, 5 U.S.C. § 553 *et seq.* (APA) ensures that the administrative interpretations are considered and reasoned to some extent. They are the product of a public process and sometimes judicial scrutiny. *See. e.g. Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (deference to the agency was, in part, supported by the fact that the policy had been adopted after "detailed and informed rulemaking").

Here, however, the new definition of income in the March, 1986 regulations was not subject to any such scrutiny. Indeed, the Secretary's failure in this regard amounts to a violation of the notice requirements of the APA. Its inconsistency with the Social Security Act

aside, the new regulation is not entitled to any deference because it was invalidly promulgated.

The notice of proposed rulemaking stated only that "for AFDC, we plan to classify payments in the nature of a windfall . . . as unearned income from a nonrecurring source and treat them as a lump sum. . . ." 49 Fed. Reg. 45558-70 (Nov. 14, 1984) (J.A. 79-81). The preamble to the proposed rule did not specifically state that HHS would include personal injury awards in its definition of windfall payments. The only examples of "windfall" in the preamble and in the language of the proposal are inheritances and lottery winnings. Despite the fact that courts around the country had already issued inconsistent decisions about the applicability of the lump sum rule to personal injury awards, the words "personal injury" are not contained in *any* part of the notice, and nowhere is any litigation even mentioned.

The final regulation issued sixteen months later contains a significant change from the proposed rule. The final regulation specifies, for the first time, that personal injury awards are income subject to the lump sum rule. 51 Fed. Reg. 9191 (March 18, 1986) (J.A. 85-86). The preamble notes, in response to "several" comments:

> We agree that specifying in regulations how personal injury awards . . . are to be treated is necessary. We, therefore, have amended the regulations to clarify that personal injury awards . . . must be treated as a lump sum income . . .

Id. This radical revision of the proposed rule is far more expansive than the original proposal. It cannot be binding since, contrary to the APA, there was no notice that personal injury awards were to be included in the scope of the proposal, and affected parties did not receive a fair

opportunity to contribute to the administrative rulemaking process.

Section 4 of the APA requires that the notice in the Federal Register of a proposed rulemaking contain "either the terms or substance of the proposed rule or a description of the subject and issues involved." 5 U.S.C. § 553(b)(3). The notice and comment procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking. *BASF Wyandotte Corp.* v. *Costle*, 598 F.2d 637 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096 (1980). Courts have been strict in reviewing an agency's compliance with this procedural rule. *Id.* at 641. *See also Weyerhauser Co.* v. *Costle*, 590 F.2d 1011, 1025-28 (D.C. Cir. 1978) (although a court defers to an agency's technical judgments, it is less hesitant to reject the agency's interpretation of statutes, and in reviewing an agency's procedural integrity, the court relies on its own independent judgment). The notice must be sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972).

"The question of adequacy of notice where a proposed rule is changed after comment . . . requires careful consideration on a case-by-case basis." *BASF*, 598 F.2d at 642. The test utilized by courts is whether the changes "are in character with the original scheme," and the final rule is a "logical outgrowth" of the notice and comments already given. *Id. See also Chocolate Manufacturers Ass'n* v. *Block*, 755 F.2d 1098, 1105 (4th Cir. 1985).

Here, the final regulation is neither in character with the original scheme nor a logical outgrowth of the notice

and comments given. HHS made no reference to personal injury awards in its proposed "windfall" regulation. The examples of windfalls given in the notice—lottery winnings and inheritances—are obviously the type of unexpected gain to the winner or beneficiary or "stroke of good luck" which is commonly considered a "windfall." *See Websters New World Dictionary of the American Language*, 2d College Edition, 1980. On the other hand, the Secretary, as a party in litigation around the country, knew well that whether personal injury awards constitute a windfall, income, or a resource was a hotly debated question.

While "several" comments were received about personal injury awards, this does not cure the defect in the notice. As one court has said:

> As a general rule, [an agency] must *itself* provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment. The APA does not require comments to be entered on a public docket. Thus, notice necessarily must come—if at all—from the agency.

Small Refiner Lead Phase-Down Task Force v. *EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (emphasis in original).

Furthermore, according to the brief description of the comments received on this issue, not one commenter suggested to HHS that the agency characterize personal injury awards as income. On the contrary, "several" commenters suggested that personal injury settlements be treated as a resource (J.A. 85). On the question of windfall payments, twenty-four commenters suggested that the agency maintain flexibility and the option allowing states to treat such payments as income or resources (J.A. 83). Thus, the expansion of the final regulation was contrary to

all comments received and contrary to the only two circuit court decisions which had been issued at that time.[11]

The entire rulemaking was extremely secretive and misleading. The process used by HHS amounts to "regulation by ambush," a process which violates the very spirit of the APA. *Kennecott* v. *EPA*, 780 F.2d 445, 452 (4th Cir. 1985). The procedures used by HHS to promulgate the new regulation should be condemned, and the regulation given no deference whatsoever.

II. THE TREATMENT OF PERSONAL INJURY AWARDS AS INCOME IS ARBITRARY AND UNREASONABLE AND VIOLATES THE AFDC EQUITABLE TREATMENT REGULATION.

As described above, Virginia treats one kind of monetary exchange as a "resource" (replacement of property) and another kind of exchange as "income" (personal injury awards). Thus, a person who sells his car for $1,000 is permitted to keep all of that money, while a child whose body is mangled in an accident must be terminated from public assistance. The results punish those unfortunate

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[11] In *Barnes* v. *Cohen*, 749 F.2d 1009, 1017-18 (3d Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 2126 (1985), the Third Circuit specifically held that personal injury awards were not "windfalls" under state law and could not be treated as lump sum income in Pennsylvania's AFDC program. The new regulation appears to be a last ditch attempt to reverse *Barnes* v. *Cohen* despite this Court's declination of *certiorari* in that case. Of course, in the case below, the Fourth Circuit held that Congress did not intend the lump sum income rule to reach payments for personal injury. 774 F.2d at 1275. The new regulation was not considered by the Seventh Circuit, even though the decision was issued one month after its publication. *Watkins* v. *Blinzinger*, 789 F.2d 474 (7th Cir. 1986). Thus, the 7th Circuit upheld only the policy which afforded states the *option* of treating personal injury awards as either income or resources.

families whose members have suffered severe bodily injury while families which have experienced a mere material loss are not so penalized.

This regulatory scheme not only runs afoul of the Act itself, see Argument Section I, *supra*, but also violates the Secretary's own regulation which prohibits such arbitrary and inequitable treatment. 45 C.F.R. § 233.10(a)(1) specifies that:

> [The state plan must] specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. The groups selected for inclusion in the plan and *the eligibility conditions imposed must not exclude individuals* or groups *on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals* or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act . . . .

(emphasis added) (Pet. App. 66)

This regulation is commonly referred to as the "equitable treatment" regulation. Based upon this provision and upon the Secretary's interpretation of it, this Court recently invalidated a New York state regulation which excluded AFDC recipients from that state's emergency assistance program. *Blum* v. *Bacon*, 457 U.S. 132, 138 (1982). Like *Blum*, here an entire category of individuals are disqualified from the program for reasons which are neither reasonable nor equitable.

In his brief the Secretary takes the position, without citing any authority, that respondents' equitable treatment claims are moot because his March, 1986, regulation now requires states to treat personal injury awards *and* casualty loss payments as lump sum income. There is no

basis for this position. The invalidity of the new regulation and the Secretary's interpretation are discussed previously and will not be repeated here. See Argument Section ID, *supra*.

Further, assuming *arguendo* that the interpretation is a legitimate one, respondents' claims are not moot because the disparate treatment between property damage and personal injury awards continues. The Secretary says that individuals who use their casualty loss payments to repair or replace the lost or damaged property may regain eligibility. This opportunity is totally unavailable to individuals who receive personal injury awards who have no ability to replace lost limbs, or buy a healthy body, or repair their pain and suffering.

Finally, the equitable treatment claim is not moot because respondents retain a personal stake in the outcome of their claim. *Firefighters* v. *Stotts*, 467 U.S. 561, 569-71 (1984); *Powell* v. *McCormack*, 395 U.S. 486, 496-98 (1969). The district court below issued a prospective injunction, enjoining Virginia and HHS from treating personal injury awards as lump sum income. The Fourth Circuit's affirmance of the relief ordered by the district court was based, in part, on the court's finding that Virginia and HHS had violated and were still violating the equitable treatment regulation. Both courts stayed class relief pending the appeals. The correctness of the relief ordered from October, 1984, through March 18, 1986, remains a live issue today.

Virginia has not viewed the March 1986 regulation as requiring casualty payments to be treated as "income" nor as mooting respondents' claim. Instead, petitioner attempts to defend its policy which is described as follows:

> Under Virginia [AFDC] rules, property damage awards are treated differently [from personal injury

> awards]. Property damage awards are considered the equivalent of the property that was lost and, thus, are counted as a "resource" exempt or partially exempt from consideration in determining a potential recipient's need for benefits.

(Pet. Brief 3).

Thus, according to the Virginia policy, had respondents lost a home or a car instead of suffering bodily injury, they could have received AFDC benefits again when their remaining funds fell below resource levels. Virginia's arbitrary and unreasonable regulation, however, has resulted in *absolute* disqualifications from the program which have continued long after *all* the family's funds were gone.

When evaluated "in light of the provisions and purposes of the public assistance titles of the Social Security Act", as required by § 233.10, there is no justification for the inequitable treatment of individuals who receive personal injury awards. The stated purpose of the AFDC program is to:

> furnish financial assistance . . .to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self support in personal independence consistent with the maintenance of continuing parental care and protection . . .

42 U.S.C. § 601.

Certainly, the financial need of a dependent child whose mother has been injured in a car accident is no different than the need of the child whose mother's car is wrecked in an accident. In fact, it is likely that the needs of the child in the family where injury has occurred are greater. The parent may suffer impairments which temporarily or permanently interfere with employment or education. The

injury may require special therapy or equipment, and periods of treatment or hospitalization may keep family members apart.

Yet Virginia takes the position that there is nothing wrong with denying financial aid to the needy child whose mother has been injured in a car accident, even when the family has no money at all. These eligibility conditions arbitrarily deny certain children desperately needed financial assistance and totally frustrate the purpose of the Act to provide financial assistance to *all* needy children. *See King* v. *Smith*, 392 U.S. 309, 330 (1968).

Virginia has failed to offer any rational justification for the distinction made between personal injury and property damage awards. Virginia first explains that payments for property damage are not treated as lump sum income because it is assumed that individuals will use the money to replace the lost property. However, as Virginia concedes, there is no requirement imposed upon recipients of property damage payments that the property actually be replaced. The assumption is, therefore, invalid.

Second, Virginia claims that the distinction became rational when it adopted the DEFRA option in November, 1985. The disqualification period can now be shortened if the disqualified family documents that the lump sum funds have been expended on certain hardship needs, including medical treatment. This attempt to justify the disparate treatment also fails. The policy still places a restriction on persons who cannot go into the market to replace losses due to pain and suffering. The shortening provisions also do nothing to cure the arbitrariness of the system since the latent consequences of the personal injury, such as relapses or the need for

special equipment may fall *outside* the disqualification period. Under Virginia's rule the injured person can not prepare for these contingencies by setting aside funds up to the allowable resource limit. Furthermore, the inequity continues in a very practical sense because the injured recipient, told he must use the personal injury award for subsistence living expenses for months into the future, will have to forego medical treatment in order to meet immediate expenses for the family's survival.

The Fourth Circuit rejected each of Virginia's attempts to rationalize the distinction between property damage and personal injury awards and concluded that the regulatory scheme was "inequitable" and contrary to the "regulations aimed at ensuring fair and unarbitrary treatment." 774 F.2d at 1275 (Pet. App. 16).[12] Virginia's eligi-

[12] While the Seventh Circuit conceded that treating personal injury awards as income is "not . . . always desirable," and "may produce harsh results," and "may be heartless," *Watkins*, 789 F.2d at 482-83, the court answered the equitable treatment argument by claiming that all that the regulation need do is to "treat like alike," *id.* at 481. *Watkins* offers two justifications for treating personal injury awards like income. First, the court states that personal injury awards are "more similar to wages or other gross receipts than to other exhanges." *Id.* at 482. But in reality, personal injury awards are much more similar to property damage awards than they are to wages. Personal injury awards and payments from property are intended primarily as replacement, while wages are intended primarily as gain.

The second justification of the Seventh Circuit is that when a property damage award is received, this "does not change the family's command over real resources," and the family does not have "greater market opportunities at its disposal." *Id.* at 481. However, a property damage award may indeed give a family greater command over real resources, for example, when the value of the resource has increased over time due to inflation or market conditions. Furthermore, the Seventh Circuit discounts the fact that our healthy bodies are resources as real as refrigerators or cars. Compensation for loss of one's resources merely returns the individual to his former position.

bility conditions totally ignore the purposes of the Social Security Act and arbitrarily deny certain children desperately needed financial assistance. The Court of Appeals was entirely correct:

> This effect is inequitable and puts the injured recipient in an untenable position when compared to the recipient who has lost a more concrete and tangible resource. The AFDC program was designed to assist the needy; the state by imposing inequitable eligibility requirements thwarts that purpose and runs afoul of regulations aimed at ensuring fair and unarbitrary treatment. *See* 45 C.F.R. § 233.10(a)(1).

Id. (Pet. App. 16).

This Court should affirm these conclusions to bring an end to Virginia's policies which aggravate the hardship of needy families whose parents or children have already suffered a personal injury.

CONCLUSION

When Congress adopted the lump sum income rule in 1981 it expressed the intent to apply the rule to income and not to all large payments of money. Recognizing this, from the rule's implementation and continuing today, Virginia has not applied the rule to large payments that are properly characterized as a resource. Thus, individuals who receive AFDC benefits may receive fair value for their homes or cars or benefit from their own insurance policies without being forced to use those funds for their subsistence.

But families who have experienced severe personal injury as a result of another's wrongdoing are treated differently and harshly. When they receive fair compensation for the damage done to them, their AFDC benefits are automatically terminated for a fixed period of time.

These families must use their compensatory awards to survive.

The inequity here is harsh and irrational. Respondents are seeking fairness and logic, as Congress must certainly have intended when it expressly limited the application of the lump sum rule to payments of income. By applying the rule to accumulated income, such as retroactive benefits, which have been characterized as income by HHS for decades, or other lump sum payments which represent a true gain to the family, Congress achieved the purposes of the OBRA amendments. Federal dollars are saved. Families that receive lump sums of income learn to budget their money.

The Secretary has tried for five years to go beyond the Congressional purpose. First states were given an "option" to ignore the statutory limits on the lump sum income rule. Now, the Secretary, through his rulemaking powers, has attempted to erase the distinction between income and resources in the AFDC program—a distinction which very clearly continues to exist in the Social Security Act.

In this instance, this Court can not allow the federal agency to change its policies and ignore the language of the statute. Deference is particularly inappropriate in light of HHS's efforts to disguise its real objectives in its recent rulemaking and its 11th hour revisions in regulations, on the eve of review by this Court.

The judgment of the Fourth Circuit must be affirmed.

Respectfully submitted

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**Counsel of Record*

APPENDIX

APPENDIX

United States District Court

FOR THE
DISTRICT OF RHODE ISLAND

C.A. No. 82-0470

JEANNETTE ROCHFORD, CAROL RODRIGUES, MANUELA PAJARO, Individually and on behalf of all others similarly situated,

Plaintiffs

v.

JOHN J. AFFLECK, individually and in his Capacity as Director of the Rhode Island Department of Social and Rehabilitative Services,

Defendant

CONSENT ORDER

The parties to this action consent, stipulate, and agree to, and by its entry of this Order the Court orders, the following:

1. Defendant will immediately review the eligibility of named plaintiffs for AFDC benefits, and in making such review will treat the proceeds from the sale of each plaintiff's resources as a resource, not as "income." If such review results in a determination that a named plaintiff is eligible for AFDC benefits, such benefits will be paid forthwith, and without limiting such plaintiff's claims and rights under the remaining terms of this Order.

2. Defendant will immediately promulgate regulatory amendments to SRS *Manual*, §§ 206, pp. 1-9, and 207, pp. 23-25, as follows:

(1) § 206, pp. 1-9 will be amended to delete any references to the proceeds from the sale of any real or personal property or other assets or resources as "income." Further, the policy of § 206, pp. 1-9, as amended, will specify that the "lump-sum" policy is not applicable to proceeds from the sale of real or personal property or other assets or resources. The policy as amended will reflect that such proceeds are treated as "resources" for AFDC purposes, and that when such proceeds, together with other non-exempt resources, are reduced to below the applicable non-exempt resource limit, eligibility for AFDC may be re-established provided other eligibility criteria are met; and current rules allowing documentation of reduction or exhaustion of resources by affidavit remain in effect and controlling in cases involving proceeds from the sale of real or personal property or other non-liquid resources.

(2) § 207, pp. 23-25 will be amended to delete any reference to proceeds from the sale of any real or personal property or other resources or assets as "income" or "lump-sum income" for AFDC purposes, and the policy, as amended, will specify that such proceeds are not "income" or "lump-sum income" for AFDC purposes.

Immediately upon the execution of this Consent Order, defendant shall take steps to notify his employees who administer the AFDC program in Rhode Island of the impending changes in SRS regulations specified in this paragraph, and shall direct said employees not to apply "lump-sum income" policy in those situations where AFDC recipients realize proceeds from the sale of real or personal property or other non-liquid resource.

3. Defendant will immediately undertake to identify all present and/or past recipients of AFDC who, while receiving AFDC benefits, realized proceeds from the sale of real or personal property or other non-liquid resource, and who had the "lump-sum income" policy of SRS *Manual*, § 207, pp. 23-25 applied to such proceeds. Such identification of present and/or past recipients of AFDC shall be made with respect to all persons who have received AFDC benefits in Rhode Island since the current "lump-sum income" policy of SRS *Manual*, § 207, pp. 23-25 was promulgated in November, 1981.

4. With respect to each person identified under the terms of Paragraph 3, above, defendant will:

a. Make all reasonable and diligent efforts to determine the present or most recent known address;

b. Send a notice, a copy of which is attached hereto and entitled "Mail Notice"; and

c. Carry out the terms of the "Mail Notice."

5. With respect to claims for prospective or retroactive benefits by any present or former recipient made in response to and under the terms of the "Mail Notice," and with respect to any administrative hearing or judicial review if such claims are initially denied, the policy that will apply shall be the revised policy promulgated under the terms of Paragraph 2, above, notwithstanding the fact that periods for which such claims are made may partially or wholly predate the promulgation of such policy, and notwithstanding the fact that more than thirty days have passed since the recipient received notice of SRS' planned termination of benefits and application of the "lump-sum income policy." Defendant shall provide a copy of this Consent Order to his administrative hearing officer.

6. In the event that defendant pays retroactive AFDC benefits under the terms of this agreement to any person who is, at the time of his/her receipt of such retroactive benefits, a recipient of AFDC benefits, such retroactive benefits shall in no case be considered "income" or "lump-sum income" to the recipient for any month, and shall not be considered a resource in either the month such retroactive payment is received or the following month.

7. The following time limits shall apply to the above provisions:

a. The promulgation and effectuation of regulations specified as Paragraph 2, above, shall be completed on or before September 1, 1982.

b. The "identification" and "location" of recipients specified in Paragraphs 3 and 4(a), above, respectively,

shall be completed by September 30, 1982, and the notice required under Paragraph 4(b) shall be sent by that date.

8. For past or present AFDC recipients who are identified, located, and sent notices under the terms of Paragraphs 3 and 4, above, the time limits contained in the "Mail Notice" shall be controlling with respect to such recipients' claims for benefits. With respect to past or present recipients who are not so identified, located, and noticed, the time limits contained in the "Mail Notice" do not apply and do not limit the right of such persons to make claims for prospective or retroactive benefits under other provisions of this Consent Order.

9. Defendant agrees to provide to plaintiffs' counsel descriptions of methods used by defendant in identifying present and past recipients under Paragraph 3 and locating such persons under Paragraph 4, and summaries and numbers of persons identified under Paragraph 3 and located and noticed under Paragraph 4, and, on written request from plaintiffs' counsel, any other information reasonably related to monitoring of defendant's compliance with the terms of this Consent Order. Plaintiffs' counsel agrees to make all reasonable efforts to make requests for such compliance-monitoring information in a manner and at such times as to minimize the burden on defendant.

10. Plaintiffs waive any and all claims for attorney's fees for work done through the date of the execution of this Consent Order by the parties, and for work done in connection with compliance-monitoring, as set forth in Paragraph 9 above; provided, however, that plaintiffs' claims for fees are not waived with respect to future litigation involving any questions of defendant's compliance with the terms of this Consent Order, including, but not limited to, defendant's compliance with the terms of Paragraph 9, above.

/s/_____

BARRY BEST
Rhode Island Legal Services, Inc.
77 Dorrance Street
Providence, Rhode Island 02903

/s/_____

RONALD A. LEBEL
Deputy Chief Legal Counsel
Department of Social and Rehabilitative Services
600 New London Avenue
Cranston, Rhode Island

ENTER:
/s/_____
JUDGE

PER ORDER:
/s/_____
CLERK

DATE August 10, 1982

DEPARTMENT OF HEALTH & HUMAN SERVICES
Refer to: SD3A1 Nov 15 1982

Social Security Administration
Region III
PO Box 8788
3535 Market Street
Philadelphia PA 19101

Constance Hall
Chief, Division of Benefit Programs
Richmond, Virginia 23288

Dear Ms. Hall:

This is in response to inquiries received from your staff concerning AFDC policy.

* * *

Situation: The State of Rhode Island Court recently ruled that the proceeds from the sale of real or personal property has to be treated as a resource rather than as Lump Sum Income when determining AFDC eligibility.

Question: What is the Federal interpretation of the regulation under 45 CFR 233.20 (2)(3) which discusses the treatment of real and personal property?

Answer: Under current Federal policy, real or personal property if sold is considered a converted resource rather than a lump sum payment. . . .

* * *

Sincerely,
Lois Mapp
State Program Specialist

Enclosure